Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

October Term, 1995

JERRY WAYNE DAYTON,

Petitioner,

v.

THE STATE OF GEORGIA,

Respondent.

On Petition For Writ Of Certiorari To The Georgia Supreme Court

PETITION FOR WRIT OF CERTIORARI

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August 2, 1995

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QUESTION PRESENTED

Whether state law enforcement officers violated the United States Constitution's Fourth Amendment protection against unreasonable searches and seizures when the officers, acting randomly and without probable cause, stopped, boarded and searched the vessel of the Petitioner while he was operating it in an inland state waterway without ready access to the open sea?

LIST OF PARTIES

The parties to the proceedings below and in this Court are the Petitioner, Jerry Wayne Dayton, and the Respondent, The State of Georgia.

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No. _____

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On Petition For Writ Of Certiorari
To The Georgia Supreme Court

PETITION FOR WRIT OF CERTIORARI

DECISIONS BELOW

The opinion of the Georgia Court of Appeals affirming the judgment of the trial court has been reprinted in the Appendix hereto, page la. Also, the order denying a rehearing by the Georgia Court of Appeals and the subsequent denial of Petition for Writ of Certiorari by the Georgia Supreme Court are reprinted in the Appendix at 3a and 4a, respectively.

STATEMENT OF JURISDICTION

The Petitioner petitions this Court for a Writ of Certiorari following the denial of his petition for a Writ of Certiorari by the Georgia Supreme Court (Case number A94A1542) on May 5, 1995. The instant Petition for Certiorari is timely based upon Sup. Ct. R. 13. The Petitioners have invoked the jurisdiction of this Court pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

Fourth Amendment to the United States Constitution

"The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated, and no warrants shall issue but on probable cause supported by oath of affirmation and particularly describing the place to be searched and the persons or things to be seized."

Fourteenth Amendment to the United States Constitution

(In pertinent part) "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

O.C.G.A. § 52-7-25 Enforcement of Article

(a) Any person empowered to enforce this article and any rule or regulation adopted pursuant hereto shall have the authority to stop and board any vessel subject to this article or any such regulation for the purpose of inspection or determining compliance with this article and is empowered to issue a summons for appearance in court or before a magistrate for all violations of this article or of the rules and regulations prescribed hereunder. Vessels of law enforcement personnel shall be marked to identify them as designated enforcement vessels.

(b) An officer empowered to enforce this article shall have the power:

(1) To arrest on view for any violation relating to boating and all rules and regulations prescribed by the board under this article;

(2) To execute all warrants and search warrants for violations of the boat laws and regulations.

(3) To serve subpoenas issued for the examination, investigation, and trial of all offenses against the laws and regulations relating to boats;

(4) To board vessels in use, for purposes of examining any documents and safety equipment, and to search without warrant any vessel which is not at its regular mooring or berth when he believes that any law of this state or any rule or regulation of

the Board of Natural Resources relating to boating has been violated;

(4.1) To board vessels in use or floating, whether moored or not, for purposes of examining any marine toilets, holding tanks, and documents related to them, including records of pump-out and certificates of compliance, and to search without warrant any such vessel to determine compliance with the provisions of this article related to marine toilets when the officer believes that any of said provisions of this article relating to marine toilets have been violated;

(5) To detain the vessel and arrest the operator of a suspected stolen vessel;

(6) To enter upon any land or water in the performance of his duty;

(7) To demand and secure proper assistance in case of emergency;

(8) To exercise the powers and duties of peace officers; and

(9) To investigate any boating accident which occurs on the waters of this state.

(c) Every vessel subject to this article if underway and upon being hailed by a designated law enforcement officer shall stop immediately and lay to or shall maneuver in such a way as to permit the officer to come aboard.

(d) Any person employed or elected by this state or a political subdivision thereof, whose duty it is to preserve the peace or to make arrests or to enforce the law, including, but not limited to, members of the sheriffs' departments, state patrolmen, and conservation rangers, are empowered to enforce this article. The Department of Natural Resources shall be primarily responsible for enforcement of this article and the rules and regulations issued under this chapter.

(e) It shall be unlawful for any person to resist or interfere by force, menace, threat, or in any other manner with any arrest for violation of this article. It shall also be unlawful for any person to refuse to go with any law enforcement officer of this state after an arrest has been made or to interfere with the officer in the performance of his duty.

(f) The department is authorized and empowered to identify by appropriate signs and markers those public waters in which certain activities may be prohibited or restricted.

STATEMENT OF THE CASE

Petitioner, while operating his boat on a Georgia lake on August 2, 1992, was stopped by two rangers from the state Department of Natural Resources. The rangers stated that they had no probable cause to stop Petitioner, that their stop was random, that he was operating his boat safely, and that he was obeying all boating laws.

Petitioner was given an intoximeter test and was subsequently arrested and charged with Boating under the Influence (BUI). Petitioner moved to suppress evidence of the intoximeter test on October 1st, 1992, arguing that the search conducted by the rangers violated both the Fourth Amendment to the United States Constitution and the Georgia Constitution. His motion, however, was denied.

At trial on April 19, 1993 and April 20, 1993, the rangers testified that they stopped the Petitioner to check his boat registration (documents) and safety equipment (fire extinguisher and life preservers) and that Petitioner was operating his boat safely and obeying boating laws. The rangers also testified that they saw nothing in the operation of Petitioner's boat that indicated that he was an unsafe boater, that he cooperated in all respects with the officers, and that both his boat registration and safety equipment were satisfactory.

At the conclusion of the trial, Petitioner was found guilty of BUI. Petitioner appealed his conviction to the Georgia Court of Appeals, which transferred the constitutional issue relating to the legality of the rangers' search to the Georgia Supreme Court, which has exclusive appellate jurisdiction over such issues. Petitioner argued that the correct statutory construction of O.C.G.A. § 52-7-25 required that subsection (b)(4) be read as a limitation of the general grant of power or authority in subsection (a) and that therefore the rangers were not authorized to stop, detain, or investigate the petitioner unless they believed that some law of the state or rule or regulation of the Board of Natural Resources had been or was being violated. Accordingly, the petitioner argued, stopping and searching his boat without probable cause

or articulable suspicion or grounds to believe he had committed a violation was not authorized by O.C.G.A. § 52-7-25. However, if the statute was not so construed, such random search and seizure violated the Georgia Constitution and the Fourth Amendment to the United States Constitution and that the evidence arising therefrom was illegally obtained and should have been suppressed.

The Georgia Supreme Court, for unspecified reasons, returned the appeal to the Appeals Court, which concluded, by virtue of the return alone, that there was no constitutional issue for resolution. (See Appeals Court Opinion in Appendix, page 1a). As a result, on February 6, 1995, the Appeals Court affirmed the judgment of the trial court. Petitioner filed a motion for reconsideration which was denied on February 27, 1995. Thereafter, the Georgia Supreme Court denied Certiorari on May 5, 1995.

REASONS FOR GRANTING

THE GEORGIA RANGERS' STOP AND SEARCH OF PETITIONER'S BOAT WITHOUT PROBABLE CAUSE OR REASONABLE SUSPICION OF WRONGDOING VIOLATED THE FOURTH AMENDMENT'S PROTECTION AGAINST UNREASONABLE SEARCHES AND SEIZURES, AS APPLICABLE TO THE STATES THROUGH THE FOURTEENTH AMENDMENT, AND RENDERED ANY EVIDENCE OBTAINED THEREFROM INADMISSABLE.

A. The Petitioner's Argument is Consistent with Current Fourth Amendment Caselaw Concerning the Constitutionality of Random Stops.

Under prevailing Fourth Amendment Doctrine, "the permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interest against its promotion of legitimate governmental interests." *Delaware v. Prouse*, 440 U.S. 648; see also *Camara v. Superior Court*, 387 U.S. 523 (1987).

In interpreting this balancing test, the court held in *Prouse* that patrolmen may not stop motorists at random to inspect their drivers' licenses absent some specific, articulable suspicion of wrongdoing. The court noted that "the 'grave danger' of abuse of discretion does not disappear simply because the automobile is subject to state regulation." at 662 (quoting *United States v. Martinez-Fuerte*, 428 U.S. 544. There is a clear analogy between the automobile cases and the present boat case. As with

automobiles, randomly stopping boats on state waterways encroaches on an individual's reasonable expectation of privacy and creates the danger for potential abuse by state officers.

As opposed to the completely random stop, the United States Supreme Court held that alternative methods such as spot checks and roadblocks, which involve less intrusion, could accomplish the state's interest in auto registration and safety laws without infringing too substantially on an individual's privacy interest. *Martinez-Fuerte*, 428 U.S. 543; see also *Michigan Police v. Sitz*, 490 U.S. 449 (1990).

With regard to watercraft, the United States Supreme Court has carved out an exception to the probable cause test for waterborne vessels operating on waters which provided ready access to the open sea. In *United States v. Villamonte-Marquez*, 462 U.S. 579 (1983), the Court held that customs officials acting pursuant to a statute authorizing customs officers to board any vessel at any time to examine the vessel's manifest, did not violate the Fourth Amendment by boarding a vessel that was located in waters providing ready access to the open sea. The court created this exception because "customs officials do not have as a practical alternative the option of spotting all vessels which might have come from the open sea." *Villamonte-Marquez*, at 589. The court clearly articulated that the exception was limited to vessels operating in areas with ready access to the open sea because, with inland waterways, checkpoints and other practical alternatives do exist: "rivers, canals, and the like which are much more analogous to roads and make the "roadblock" approach more feasible, such is not the case in waters

providing access to the seaward border beyond which is the open sea." *Id.* Applying this reasoning to the present case, state officers could have easily set up fixed checkpoints along or around channels or around the entrances to ports, harbors, and docks in order to perform document and safety checks, or by the use of an "Area Warrant." *United States v. Almeida-Sanchez*, 413 U.S. 266 (1973). Alternatively, state officers could reasonably refrain from acting until they have reason to believe a violation is occurring or has occurred because as the court noted in *Prouse*, "drivers without licenses are presumably the less safe drivers whose propensities may well exhibit themselves." *Id.*, at 659. *Klutz v. Beam*, 374 F. Supp. 1129 (W.D.N.C.1973).

B. In The Context Of Private Watercraft Operating On Waterways Which Provide No Ready Access To The Open Sea, Balancing the Governmental Regulatory Interest In Random, Suspicionless Stops Against The Individual's Fourth Amendment Interest In Privacy And Security Favors A Finding That Such Stops Are Unconstitutional.

The state government's interest in these random intrusions must outweigh the individual's privacy interest. In the present case, the state's interest is far less important than the federal government's interest in *Villamonte-Marquez* where the documentation laws served as:

> "the linchpin for regulation of participation in certain trades such as fishing, salvaging, towing and dredging . . . and allow for regulation of imports and exports (and) play a vital role in the collection of customs duties and tonnage

> duties." Id. at 591. The Court also noted that the federal interest was strong enough in waters close to the open sea to overcome the Fourth Amendment "where the need to deter and apprehend smugglers is great." *Id.* at 593.

Most of these interests disappear or are greatly reduced within the context of inland state waterways used almost exclusively by recreational boaters. State lakes are rarely used commercially for transporting cargo. *United States v. Gollwitzer*, 697 F.2d 1357 (11th Cir. 1983). Therefore, state concerns in enforcing laws in the areas of international customs duties, contraband, and smuggling are reduced exponentially and, thus, the state's interest, taken as a whole, is lessened to the point that it is overcome by the individual's privacy interest. While the state's interest in vessel identification and safety is important, fixed checkpoints could fulfill the government's interest while allowing boaters the degree of privacy envisioned by the Fourth Amendment. As the court noted in *Prouse*, a "marginal contribution" to safety "cannot justify subjecting every occupant of every vehicle to a seizure . . . at the unbridled discretion of law-enforcement officials." *Prouse*, at 654.

The second element of the Fourth Amendment's balancing test, the individual's interest against governmental intrusion also favors the Petitioner's assertion that his Fourth Amendment rights were violated. An individual's "reasonable expectation of privacy" (*Katz v. United States*, 389 U.S. 347 (1967)) can vary depending on the area or right encroached upon. The reasonable expectation of privacy for an individual on a boat is equal to or

greater than the expectation of privacy in an automobile. *United States v. Cadena*, 588 F.2d 100 (5th Cir. 1979).

First, as private homes have a higher expectation of privacy than automobiles, so too should boats incapable of ocean travel, as individuals often reside in houseboats or small pleasure craft located on inland lakes. *Id.*, at 101; *United States v. Gollwitzer*, 697 F.2d 1357 (11th Cir. 1983). As hereinbefore indicated, these boats do not normally operate commercially, so "their reasonable expectation of privacy is greater than the degree of privacy enjoyed by sailors on board large fishing boats or yachts which are capable of ocean travel and commonly carry illicit cargo." *Gollwitzer*, 697 F.2d at 1360. Allowing those who live on such vessels to be subjected to potential abuses of the unbridled discretion of state officers runs contrary to the purpose of the Fourth Amendment "to safeguard the privacy and security of individuals against arbitrary invasions" *Camara v. Municipal Court*, 387 U.S. 523 (1967).

Second, unlike an automobile which often serves as simply "a basic, pervasive and often necessary mode of transportation," *Prouse, supra*, at 662, a boat is used for more intimate and private type of leisure. As the Fifth Circuit articulated in *Cadena*: "there is hardly the expectation of privacy even in the curtained limousine or the stereo-equipped van that every mariner or yachtsman expects aboard his vessel." *Cadena*, at 101. Entire families seek the togetherness and solitude available on their boats. Because lakes, rivers, and streams are much less crowded and subject to much less traffic than roads, the passengers in a boat reasonably expect a greater degree of privacy and intimacy than in an automobile.

CONCLUSION

The Georgia Courts erred in denying the Petitioner's Motion to Suppress and subsequent constitutional challenges. An individual's reasonable expectation of privacy in the operation of recreational watercraft on inland state waterways is equal to or greater than an individual's privacy interest in operating an automobile. In contrast, the state's interest in conducting document and safety inspections on inland state waterways, as opposed to the operation of vessels on the open sea, though important, can be satisfied using less intrusive, practical alternatives such as checkpoints, area warrants, or acting only when a violation has been observed. Accordingly, the court should find that the Petitioner's Fourth Amendment right against unreasonable searches and seizures was violated by the random, unlawful boarding and searching of his boat by state officers.

For these reasons, Petitioners respectfully urge the Court to grant the Petition for Writ of Certiorari to the Georgia Supreme Court.

Respectfully submitted,

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SECOND DIVISION
BIRDSONG, P.J.,
BLACKBURN AND RUFFIN, JJ.

NOTICE: MOTIONS FOR RECONSIDERATION MUST BE RECEIVED IN OUR CLERK'S OFFICE WITHIN TEN DAYS OF THE DATE OF DECISION to be deemed timely filed. (Court of Appeals Rules 4 and 37, January, 1, 1995)

February 6, 1995

In the Court of Appeals of Georgia

A94A1542. DALTON v. THE STATE. (Bi-68C)

BIRDSONG, Presiding Judge

Jerry Wayne Dalton appeals his conviction for boating under the influence of alcohol. He contends his boat was unlawfully stopped on Lake Lanier because the evidence showed the Department of Natural Resources' rangers randomly stopped his boat without probable cause or reasonable suspicion that he had committed an offense. *Held*:

The record shows that the rangers stopped the boat to conduct a safety inspection and only thereafter suspected that Dalton was under the influence. Dalton was then administered a breath test and two hours after he was stopped his blood alcohol content was .11 grams percent.

Dalton asserts that the rangers stopped his boat without probable cause to conduct an inspection under OCGA § 52-7-25(a): "Any person empowered to enforce this article and any rule or regulation adopted pursuant hereto shall have the authority to stop and board any

vessel subject to this article or any such regulation for the purpose of inspection or determining compliance with this article." Dalton contends that randomly stopping boats under this article was unconstitutional because police cannot randomly stop and inspect automobiles under *Delaware v. Prouse*, 440 U. S. 648 (99 SC 1391, 59 LE2d 660).

As Dalton challenged the constitutionality of OCGA § 52-7-25(a), this court transferred the appeal to the Supreme Court. The Supreme Court, however, returned the appeal to this court. As the Supreme Court returned this case to this court, there is no constitutional issue for resolution. "The transfer of the case by the Supreme Court to this court is a final determination that no constitutional question was in fact properly raised or, if so raised, that it was not meritorious." *Krause v. Vance*, 207 Ga. App. 615, 622 (428 SE2d 595).

Therefore, the only issue for resolution by this court is whether the stop was lawful. As the evidence shows the stop of Dalton's boat was authorized by OCGA § 52-7-25(a), the trial court correctly denied Dalton's motion to suppress.

Judgment affirmed. Blackburn and Ruffin, JJ., concur.

Court of Appeals
of the State of Georgia

ATLANTA, FEBRUARY 27, 1995

The Honorable Court of Appeals met pursuant to adjournment.

The Following order was passed:

Case No. A94A1542

JERRY WAYNE DALTON V. THE STATE

Upon consideration of the motion for reconsideration filed in this case, it is ordered that it be hereby denied.

Court of Appeals of the State of Georgia
Clerk's Office, Atlanta FEB 27 1995

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Clerk.

/s/ William L. Matir

SUPREME COURT OF THE STATE OF GEORGIA
CLERK'S OFFICE
ATLANTA

DATE: May 05, 1995

Winship E. Rees
246 Pike Street
Lawrenceville GA 30245

Case No. S95C0937

JERRY WAYNE DALTON V. THE STATE

COURT OF APPEALS CASE NO. A94A1542

The Supreme Court today denied the petition for certiorari in this case.

All the Justices concur.

Sincerely,

Sherie M. Welch, Clerk

Supreme Court, U.S.
FILED
OCT 24 1995
CLERK

No. 95-205

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JERRY WAYNE DALTON,

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On Petition For Writ Of Certiorari To The Supreme Court Of Georgia

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QUESTION PRESENTED

I.

Should this Court decline to grant certiorari to review Petitioner's fact specific claim that his Fourth Amendment rights were violated by the actions of state game wardens in stopping Petitioner's recreational boat on an open lake to conduct a safety check authorized by a state statute and, upon detecting the ordor of alcohol, subsequently arresting him for operating a vessel while under the influence of alcohol?

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PART ONE

STATEMENT OF THE CASE

Petitioner, Jerry Wayne Dalton, was charged in an accusation filed in the State Court of Hall County, Georgia, on August 26, 1992, with one count of boating under the influence and one count of operating a vessel with an unlawful alcohol concentration. (Record 3-4) (hereinafter R.). At a jury trial on April 19-20, 1993, the trial court directed a verdict of acquittal on count one, boating under the influence, because the count had been incorrectly drawn. (Trial Transcript pp. 1, 142-43) (hereinafter designated T). The jury found Petitioner guilty of count two, operating a vessel with an unlawful alcohol concentration. (T. 219). Petitioner was sentenced to 12 months on probation and ordered to pay an $800 fine, to perform 30 hours of community service, and to attend a risk reduction program. (T. 220). The trial court subsequently ordered that the sentence be suspended pending appeal. (R. 39).

Petitioner filed a timely notice of appeal. The case was docketed in the Georgia Court of Appeals on March 30, 1994. On April 18, 1994, Petitioner filed his enumeration of error and brief as well as a motion to transfer the case to the Georgia Supreme Court as he sought to challenge the constitutionality of O.C.G.A. § 52-7-25(a). On May 2, 1994, the state filed its brief and a response in opposition to the transfer motion, asserting in part that Petitioner had not preserved the constitutional challenge as he had not sought interim review of the trial court's denial of the motion to suppress.

On May 5, 1994, the Georgia Court of Appeals granted the motion, noting that Petitioner sought to challenge the constitutionality of O.C.G.A. § 52-7-25. Petitioner subsequently filed his enumeration of error and brief in the Georgia Supreme Court on May 16, 1994.

On May 26, 1994, the Georgia Supreme Court "ordered that this case be hereby returned to the Court of Appeals." (May 26, 1994, Georgia Supreme Court Order). The case was reinstated in the Georgia Court of Appeals on May 31, 1994.

On February 6, 1995, the Georgia Court of Appeals entered its decision, finding that the return of the case by the Georgia Supreme Court indicated either that the constitional challenge had not been properly raised or, if properly raised, was without merit. *Dalton v. State*, 216 Ga. App. 411, 454 S.E.2d 554 (1995). The court found that the stop of Petitioner was lawful under O.C.G.A. § 52-7-25(a) and affirmed the trial court's denial of the motion to suppress. *Id.* Petitioner's motion for reconsideration was denied on February 27, 1995. The Georgia Supreme Court subsequently denied Petitioner's petition for a writ of certiorari on May 5, 1995.

Petitioner has now filed the instant petition, seeking review of the state court decision. Respondent files this brief in opposition.

Due to the nature of the issues presented, Respondent will not set forth a detailed statement of facts underlying the offense at this time but adopts and relies upon the following facts found by the Georgia Court of Appeals:

> The record shows that the rangers stopped the boat to conduct a safety inspection and only thereafter suspected that Dalton was under the influence. Dalton was then administered a breath test and two hours after he was stopped his blood-alcohol content was .11 grams percent.

Dalton, 216 Ga. App. at 411.

REASONS FOR NOT GRANTING THE WRIT

I. AS THE STATE APPELLATE COURT DID NOT REACH THE FOURTH AMENDMENT QUESTION BUT RESOLVED THE VALIDITY OF THE STOP UPON AN INDEPENDENT AND ADEQUATE STATE LAW GROUND, THIS COURT SHOULD DECLINE TO GRANT CERTIORARI.

Petitioner claims that his Fourth Amendment protection against unreasonable searches and seizures was violated when law enforcement officials, allegedly at random and without probable cause, "stopped, boarded, and searched" his boat, and he urges this Court to grant review to consider the validity of that stop. Respondent submits this question presents no basis for the grant of certiorari as the validity of the stop was resolved by the state appellate court upon an independent and adequate state law ground – i.e., the stop was authorized under O.C.G.A. § 52-7-25(a). Alternatively, Respondent submits that the stop was reasonable under *United States v. Villamonte-Marquez*, 462 U.S. 579 (1983), as it was a brief intrusion on an inland lake for the sole purpose of checking the registration and safety equipment on Petitioner's

recreational boat pursuant to a state statute which permits safety checks. Accordingly, Respondent submits that no question has been presented to warrant the grant of certiorari.

The State of Georgia has enacted an article known as the "Georgia Boat Safety Act." O.C.G.A. § 52-7-1. Petitioner was found guilty of violating O.C.G.A. § 52-7-12(a)(4) of this article, which provides in pertinent part, "No person shall operate, navigate, steer, or drive any moving vessel, or be in actual physical control of any moving vessel . . . while the person's alcohol concentration is 0.10 grams or more at any time within three hours after operating . . . a moving vessel." The Georgia Department of Natural Resources is primarily responsible for enforcement of the Georgia Boat Safety Act. O.C.G.A. § 52-7-25(d). Petitioner was stopped by Natural Resources officers pursuant to O.C.G.A. § 52-7-25 of the Georgia Boat Safety Act, which provides in pertinent part:

> (a) Any person empowered to enforce this article and any rule or regulation adopted pursuant hereto shall have the authority to stop and board any vessel subject to this article or any such regulation for the purpose of inspection or determining compliance with this article and is empowered to issue a summons for appearance in court or before a magistrate for all violations of this article or of the rules and regulations prescribed hereunder. Vessels of law enforcement personnel shall be marked to identify them as designated enforcement vessels.
>
> (b) An officer empowered to enforce this article shall have the power:

> (1) To arrest on view for any violation relating to boating and all rules and regulations prescribed by the board under this article;
>
> * * *
>
> (4) To board vessels in use, for purposes of examining any documents and safety equipment, and to search without warrant any vessel which is not at its regular mooring or berth when he believes that any law of this state or any rule or regulation of the Board of Natural Resources relating to boating has been violated;
>
> * * *
>
> (8) To exercise the powers and duties of peace officers. . . .

Petitioner did not challenge the constitutionality of O.C.G.A. § 52-7-25 on federal grounds but claimed only the stop of his boat violated his Fourth Amendment rights and that O.C.G.A. § 52-7-25(a) allegedly violated the Georgia Constitution. Specificially, on October 1, 1992, Petitioner filed a motion to suppress the results of an intoximeter test, with one basis being that law enforcement officials allegedly did not have probable cause to stop his boat. (R. 9). On December 9, 1992, Petitioner amended the motion to suppress to assert that O.C.G.A. § 52-7-25 was unconstitutional under Art. I, Sec. I, Para. XIII of the Georgia Constitution in that the statute "purports to aurthorize law enforcement officials to stop and board any vessel subject to it without probable cause." (R. 15).

A hearing was held on the motion to suppress on February 26, 1993. (2/26/93 Motion to Suppress Transcript) (hereinafter designated M.T.). Officers David

Cochran and Melvin Dale Clayton, employees of the Georgia Department of Natural Resources, testified as to the details of the stop.

The officers were patrolling the Shoal Creek area of Lake Lanier by boat and making safety inspections. (M.T. 3; 8). They had stopped approximately 20 other boats for safety violation checks prior to stopping Petitioner's recreational boat at approximately 8 p.m. (M.T. 3, 6; 7). The stop was part of their routine safety checks, and their standard procedure was to go to areas of "high activity" – i.e., high usage and heavy travel, and check boats for safety equipment and registration violations. (M.T. 4). The officers would generally identify the operator first, stop the vessel and ask for a registration card and safety equipment. (M.T. 3). The safety checks generally took about five minutes. (M.T. 6).

Officer Cochran testified that they stopped Petitioner's boat for a safety inspection. (M.T. 5). Officer Clayton testified that, as they were headed toward Petitioner's vessel, they "couldn't tell" about Petitioner's registration so they decided to stop Petitioner's boat for a registration check and safety equipment inspection. (M.T. 8). During the process of inspecting the safety equipment and registration, both officers noticed the odor of alcohol as well as Petitioner's lack of coordination when producing the safety equipment. (M.T. 5; 8-9). Officer Cochran noticed alcohol in the boat as well. (M.T. 5).

At the motion to suppress hearing Petitioner argued for a limiting construction of O.C.G.A. § 52-7-25(a), asserting that the general power set forth in § 52-7-25(a) to stop and inspect or determine compliance with the

article should be limited by O.C.G.A. § 52-7-25(b)(4) so that officers allegedly could not stop an individual unless they had reason to think a law or rule had been violated. (M.T. 14). Petitioner also asserted that, since policemen could allegedly not stop motorists at random to inspect their licenses and registration under *Delaware v. Prouse*, 440 U.S. 648 (1979), officers could not stop Petitioner without some suspicion of wrong doing. (M.T. 14).

The trial court declined to follow Petitioner's offered limiting construction of O.C.G.A. § 52-7-25(a). (M.T. 15). The court read § 52-7-25(a) as permitting officers to "board for purpose of examining any document and safety equipment without there having been any violation" and that § 52-7-25(b)(4), which authorized a search without a warrant, required a reasonable belief that some violation had occurred. (M.T. 15). The trial court found that Petitioner's boat had not been searched. (M.T. 16). The trial court offered to let Petitioner take the issue up on interim review, but Petitioner declined and said that he preferred to have the state appeal from the grant of the motion to suppress. (M.T. 17-18). The trial court denied "this part" of the motion to suppress, noting both that "there's reasonable articulable suspicion based on what I've heard" and that § 52-7-25(a) "allows for them to stop, just to do safety checks." (M.T. 18).

Petitioner subsequently testified at the suppression hearing that he was told he was being stopped for a "routine check" and that he had done nothing wrong. (M.T. 39-40).

The trial court ultimately ruled:

> I want to make it a little clearer, it if needs to me [sic], my ruling initially about the right of the officers to stop. 52-7-25 – I think (a) applies as well as (b), and (a) states that any person empowered to enforce this article and any rule or regulation and doctrine pursuant hereto shall have the authority to stop and board any vessel subject to this article for the purpose of inspection or determining compliance with this article and is empowered to then issue a summons for appearance in court for all violations
>
> So I want to make it clear that it's based on (a) as well as (b). I guess the legislature – and it makes a certain amount of sense – that they would say that they have the ability to stop and check for safety violations in this kind of case as opposed to a car because a boat is different, in a different setting, than a car is. I mean, if there aren't a certain amount of life preservers on there, people are thrown off the boat, they can drown. This is not the case in a car. I mean, there aren't any life preservers in a car. So there's a reason for a different standard and the legislature I think has recognized that.
>
> * * *
>
> The motion is denied.

(M.T. 40-41). The trial court's written order denying the motion to suppress did not reiterate the reasons for the denial. (R. 19).

As noted in the Statement of the Case above, the case was transferred to the Georgia Supreme Court pursuant

to Petitioner's motion to transfer as he sought to challenge the constitutionality of O.C.G.A. § 52-7-25(a). Under state law, the Georgia Supreme Court has exclusive appellate jurisdiction of all cases involving the constitutionality of a law. 1983 Ga. Const. Art. VI, Sec. VI, Para. II(1). The Georgia Court of Appeals exercises jurisdiction in all cases not reserved to the Georgia Supreme Court. 1983 Ga. Const. Art. VI, Sec. V, Para. III. The Georgia Court of Appeals "has no authority to determine the constitutionality of a State statute. . . . " *Burson v. State*, 183 Ga. App. 647, 648, 359 S.E.2d 731 (1987).

After Petitioner filed a brief in the Georgia Supreme Court, that Court simply ordered that the case be returned to the Court of Appeals without giving an explanation. In the subsequent decision in Petitioner's appeal, the Georgia Court of Appeals noted that the return of the case meant either that the challenge to the constitutionality of the statute had not been properly raised or, if properly raised, lacked merit. *Dalton*, 216 Ga. App. at 411, quoting *Krause v. Vance*, 207 Ga. 615, 622, 428 S.E.2d 595 (1993). The court then found that the stop of Petitioner was authorized by O.C.G.A. § 52-7-25(a) so that the motion to suppress was correctly denied. *Dalton*, 216 Ga. App. at 411.

Thus, the Court of Appeals did not reach Petitioner's contentions that the stop was allegedly violative of the Fourth Amendment. Accordingly, Respondent submits that this Court should decline to grant certiorari to consider issues which were resolved by the state appellate court upon an independent and adequate state law ground. *Sochor v. Florida*, ___ U.S. ___, 112 S.Ct. 2114, 2119

(1992); *Michigan v. Long*, 463 U.S. 1032, 1041 (1983); *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945).

Alternatively, Respondent submits that the finding by the Georgia Court of Appeals that the brief, investigatory stop was lawful is demonstrably in accord with prior decisions of this Court. In *United States v. Villamonte-Marquez*, 462 U.S. 579, 589 (1983), this Court upheld a somewhat similar federal statute which authorized customs officers to board any vessel to examine the vessel's manifest and other documents or papers. This Court focused upon the "reasonableness" of governmental intrusions involving vessels and upheld the statute largely upon the factual differences between boats and cars. The Court found that it would not be "practical" to have permanent checkpoints on waters because vessels could move in any direction, while cars had to follow established avenues. *Id.* at 589. The Court also observed the differences in documentation with respect to vessels and cars, noting that many vessels did not have "comparable 'license plates' or 'stickers' " that are issued to cars. *Id.* at 590. "Requests to check certificates of inspection play an obvious role in ensuring safety on American waterways." *Id.* at 591.

The Georgia statute at issue in this case is somewhat analoguous to the federal statute in that it permits officers to board vessels to inspect and ensure compliance with the Georgia Boat Safety Act. Similar interests and the impracticality of less intrusive means are present in this case as were present in *Villamonte-Marquez*.

Petitioner has analogized Lake Lanier, on which he was stopped, to inland waterways such as rivers, canals,

and the like which are arguably more analogous to using "roadblocks" as are used on highways. Petitioner has also asserted that an individual's privacy interest outweighs the state's interests, describing the state's interests as being "greatly reduced within the context of inland state waterways used almost exclusively by recreational boaters." (Petitioner's brief, p. 11). This characterization of Lake Lanier as an inland waterway is not supported by this record and is not an accurate description of Lake Lanier. *See, e.g., Lake Lanier Cottage Owners Ass'n v. BMS Enterprises, Inc.*, 194 Ga. App. 858, 392 S.E.2d 312 (1990) (case involving award of fees for use of amenities by BMS "at a development at Lake Lanier Islands" regarding cottages, conference center, pool, tennis courts and roads); *Lake Lanier Islands Development Authority v. Village Harbor, Inc.*, 152 Ga. App. 705, 264 S.E.2d 23 (1979) ("action by Lake Lanier Islands Development Authority to terminate a lease and to recover possession of certain real property occupied by the defendant").

Contrary to Petitioner's suggestions, it would not be feasible to use fixed checkpoints on an open lake because of the ready access to it from innumerable points, such as public and private docks along the miles of shoreline and its inlets and coves. Roadblocks would not be practical on an open lake as there is no road to block. *Villamonte-Marquez* recognized that customs officials "do not have as a practical alternative the option of spotting all vessels which might have come from the open sea and herding them into one or more canals or straits in order to make fixed checkpoint stops." *Villamonte-Marquez*, 462 U.S. at 589. Similarly, law enforcement officials on a large, inland lake would not have an option of herding the large numbers

of boats coming from public and private docks all around the lake to a particular point in order to conduct fixed checkpoint stops.

As this Court has previously recognized, the system of registration for boats is not as precise and detailed as cars. As one officer noted at Petitioner's trial, when driving by a boat, it is difficult to determine the registration's expiration date. (T. 47-48).

The statute at issue also permits a stop to check safety equipment. This Court noted the importance of safety checks in ensuring safety on American waterways. *Villamonte-Marquez,* 462 U.S. at 591. As the trial court observed in this case, if not enough life preservers are on board when a boat was in use, someone could drown if he or she were thrown overboard. The state's interests in ensuring safety on lakes with heavy recreational use would increase, rather than diminish as Petitioner suggests.

Finally, the procedure employed was only a brief, investigative stop for the limited purpose of a safety check. The check involved the public area of the boat and the boat was not searched, as the trial court found. The stop created only a modest and limited intrusion and would not have taken longer then five minutes had officers not detected the odor of alcohol, which ultimately led to Petitioner's arrest for operating the boat while under the influence of alcohol. Under the facts of this case, Respondent submits that the actions of law enforcement officers in stopping Petitioner's boat for a routine safety inspection were reasonable and were not violative of the Fourth

Amendment. Thus, this Court should decline to grant certiorari.

CONCLUSION

Wherefore, for all of the above and foregoing reasons, Respondent prays that this Court decline to grant certiorari as the issues were either decided by the state appellate court upon an independent and adequate state law ground or are demonstrably in accord with prior decisions of this Court.

Respectfully submitted,

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